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IN THE

SUPREME COURT OF THE UNITED STATES
Term, 1973
No.

EARL WHITE,

Petitioner,

versus

DR. GLEN E. PADGETT, DR. ROY W. WANDECK, and FAYE L. CONNOR,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. BEN WATKINS
Watkins & Hill
The Title Building
Tallahassee, Florida

SCOTT NABORS
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida

BEN F. BARNES
Barnes & Grant
114 S. Jefferson Street
Marianna, Florida

THOMAS C. WILKINSON
115 N. Jefferson Street
Marianna, Florida

W.K. WHITFIELD
Exchange Building
Tallahassee, Florida

Attorneys for Respondents

PETITION NOT PRINTED

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Respondents, DR. GLEN E. PADGETT, DR. ROY W. WANDECK, and FAYE L. CONNOR, file this Brief in Opposition to Petition of EARL WHITE, seeking Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to review the judgement and opinion of that court entered in the cause on March 2, 1973.

OPINIONS BELOW

The opinion of the District Court announced on February 2, 1972, (N.D. Fla. February 21, 1972) dismissed the action for failure to state a claim upon which relief can be granted. The Court of Appeals affirmed (Fifth Circuit, March 2, 1973) holding that the statute of limitations barred Petitioner's cause of action (see attached opinion). Petition for rehearing was denied on April 3, 1973.

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C., Section 1343.

QUESTIONS PRESENTED

Whether the Court of Appeals erred in holding that the applicable statute of limitations for an action brought under Title 42 U.S.C.A., Sec. 1983, is Fla. Stat., Sec. 95.11 (5) (a) (1971.)

REASONS FOR DENYING THE WRIT

POINT ONE

Petitioner argues that on actions brought pursuant to Title 42 U.S.C.A., Sec. 1983, there is a conflict between the Circuit Courts of Appeal as to which statute of limitations is to be applied. Respondents submit there is no conflict between the decisions of the Courts of Appeal in this regard.

Petitioner concedes the **applicable statute of limitation is the one which the forum state would apply,** and **when Congress has provided no period of limitation for a federal claim, the Federal Courts must borrow the applicable statute of limitations from the state in which it sits.** O'SULLIVAN V. FELIX, 233 U.S. 318 (1914); BEARD V. STEPHENS, 372 F. 2d 285 (5th Cir. 1967).

Up to this point, Petitioner and Respondents are in agreement. However, Petitioner then takes the position that decisions from Courts of Appeal of the various circuits are in conflict as to which state limitation should apply in a given case.

One decision supposedly in conflict was cited as MCGUIRE V. BAKER, 421 F. 2d 895 (5th Cir. 1970). That case involved a landowner's action for damages for alleged destruction of speculative value of land, as a result of dry holes drilled by oil companies. Action was barredbecause the landowner had taken no action for two years. The Texas two year statute of limitation read as follows:

> "There shall be commenced and prosecuted within two years after the cause of action shall have accrued...all actions or suits...of the following description:
>
> 1. Actions of trespass for injury done to the estate or property of another."

The Court then stated:

> "It is well established that when as here, Congress has provided no period of limitation for federal claim, the Federal Courts must borrow the

applicable statute of limitations from the state in which it sits...This borrowing is a two step process. First the essential nature of the federal claim must be determined. Secondly, the state law must be looked to in order to determine which state statute is applicable to claims like the one the Court has determined it is presented with...

"Although McGuire argued that his action is essentially of an equitable nature...it seems clear that it is really to recover damages...or for trespass...in either case the Texas two year statute of limitations applies..."

It would seem clear that the Court in MCGUIRE **supra**, was applying Texas statute of limitations as intended by that state. Although McGuire argued the equitable nature of his claim, the Court held that even if he could assert such a theory because of the constitutional claim, the essentially trespass character of the claim was not changed. This is entirely consistent with the holding in the case **sub judice**.

In the case of MONROE, ET AL., V. PAPE, ET AL., 365 U.S. 167 (1961), also cited by the Petitioner, the petition was for certiorari to the Court of Appeals for the Seventh Circuit. Petitioners (six Negro children and their parents) brought action in the Federal District Court against the City of Chicago and thirteen police officers for violation of their rights under the Fourteenth Amendment.

This case had nothing with the question of statute of limitations and creates no conflict in that regard. The Court was merely looking to see whether state law was being administered impartially as to all citizens and that all were being accorded equal protection. The main issue as stated by that Court is as follows:

...

"There was no...quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty..."

In the case of HOFFMAN V. WAIR, 193 F. Supp. 727 (D.C., Oregon 1961), Petitioner also seeks to find conflict. This case involved an action to recover damages for an alleged conspiracy to violate the Plaintiff's civil rights.

The applicable Oregon statute provided for a six year statute of limitation for actions upon a liability created by statute, and a two year limitation in actions for fraud, deceit, assault, battery, false imprisonment, criminal conversation, or for any injury to the person or rights of another, not arising on contract, and especially enumerated. The Plaintiff contended the six year limitations applied while Defendant countered that the two year limitation was applicable.

It was the opinion of the Court the conflict as to which of the two statutes would apply would be resolved by ascertaining the meaning of "a liability created by statute," and in arriving at its definition the Court stated:

> "...the true right or duty alleged to have been infringed or breached...must be asserted in order to determine the foundation or source of any legal liability flowing therefrom...merely because personal injury is inflicted upon one in the course of the violation of federal law by another, i.e. violation of civil rights, Title 42, U.S.C.A. Sec. 1983, does not change the resulting liability of the wrongdoer for a tortuous act under common law, and the applicable state limitation of action thereon should apply."

Again the Court looks to the applicable state law in determining whether or not a particular action is barred. This is consistent with the instant holding review of what is sought.

The case of LUCOM V. ATLANTIC NATIONAL BANK OF WEST PALM BEACH, FLORIDA, 354 F. 2d 51 (5th Cir. 1965) involved a diversity suit for damages resulting from taking of property without due process. Summary judgment was entered by the District Court on grounds the action was barred by limitations. In affirming, the Court of Appeals stated:

> "Florida has two limitation statutes which might be relevant to this matter: Fla. Stat. Ann. Sec. 95.11, which provides a general four year period and a three year period...;

> "Florida cases hold that when two statutes limit the time in which an action may be brought, both apply and the dilatory **litigant is caught by whichever runs first.**" (Emphasis supplied).

The Court then determined **either** statute might bar the Appellant's action, and under Florida law a cause of action accrues and the statutory limitation period commences when the invasion of a right occurs, if there is notice of the invasion, even though the damage may not materialize until later.

In KNOWLES V. CARSON, 419 F. 2d 369 (5th Cir. 1969), an action was brought against certain officials of the State of Florida, alleging civil conspiracy under the Civil Rights Act. In affirming the District Court dismissal of the Complaint as barred by the Statute of Limitations, the Court of Appeals stated:

> "Sections 1983 and 1985 do no include a specific limitation. Since the Act contains no provision limiting the time within which an action thereunder may be brought, the applicable statute of limitations is **that which the state would enforce has the action seeking similar relief been brought in the state court**..." (Emphasis supplied).

Again this is totally consistent with the instant opinion. In the later case of NEVELS V. WILSON, 423 F. 2d 691 (5th Cir. 1970) the Court held an action for violation of civil rights was governed by state statute of limitations prescribing actions for liabilities created by statute must be commenced within three years. The Court further stated:

> "It appears...that the event...occurred more that three but less than four years prior to the filing of the complaint. F.S. 95.11 (5) (a) F.S.A. provides that actions for liabilites created by statute must be commenced within three years after the accrual of the action. We find that statute to be controlling as to the civil rights claim...thus the claim is barred..."

Moving to another circuit, in MILLS V. SMALL, 446 F. 2d 249 (9th Cir. 1971), the Plaintiff brought **in propria persona** action charging the medical examiner for Superior Court with certifying he had examined Plaintiff when he had not. The District Court dismissed on grounds the action was barred by the statute of limitations and was affirmed by the Court of Appeals. The Appeals Court stated:

> "...We assume it (complaint) charges a violation of her (Plaintiff's) civil rights under 42 U.S.C., Sec. 1983. That statute contains no limitation period but resort can be made to California law. A liability created by statute must be brought within three years..."

All cases cited by Petitioner are in total accord with and form the basis for the conclusion reached by the Fifth Circuit Court of Appeals in this case. Nowhere is conflict shown.

POINT TWO

Petitioner argues the statute of limitations should have been tolled during the 2-year period he was engaged in seeking a remedy in the State Court, and the statute of limitation did not begin to run at the time of adjudication but instead ran from the time he attempted to vote.

In his Brief, the Petitioner is attempting to again argue the merits of the case. Petitioner relies on the case of MIZELL V. NORTH BROWARD HOSPITAL DISTRICT, 427 F. 2d 468 (5th Cir. 1970). The case involved an action under the Civil Rights Act by a surgeon alleging violation of his constitutional rights by the Hospital District and certain doctors in the suspension of his surgical privileges. The Court stated:

> "The trial court applied the state statute of limitations...and held that in a single conspiracy case the statute of limitations begins to run from the date of the **first overt act** causing injury to the Plaintiff...." (Emphasis supplied).

In BUCK V. MOURADIAN, 100 So. 2d 70 (3rd Cir. 1958) the court stated:

> "The general rule is to the effect that when there has been notice of the invasion of a legal right or a person has been put on notice of his right to a cause of action the statute of limitations begins to run..."

In the case **sub judice** Petitioner states he was never incompetent and therefore should not have been institutionalized. If this be the case, then "notice" occurred at the first moment he was confined on April 18, 1965. He was delivered to Escambia General Hospital on August 21, 1965 and subsequently released on August 30, 1965, since he was not, in the opinion of Dr. Theodore J. Marshall, M.D., suffering from any psychiatric disease.

The accrual of the cause of action may be predicated upon the last overt act, KNOWLES V. CARSON, **supra**, HOFFMAN V. HALDEN, **supra**, and even incarceration in prison does not toll the limitation period. KNOWLES V. CARSON, **supra**.

The date of the alleged last overt act "by these Defendants would be the date of the inquisition of incompetency on August 21, 1965. The present action was commenced by filing the original complaint on June 23, 1971. Some five years, ten months and two days elapsed between these two dates. Using these dates this action would be barred both by the 4-year limitation of Florida Statutes Section 95.11 (4) and the 3-year limitation of Section 95.11 (5) (a).

The Court of Appeals found on page 7 of its order, and rightly so, that Section 95.11 contains no provision suspending or tolling the limitation period because of disability arising from insanity or any other cause. The Court then quoted from CAREY V. BEYER, Fla. 1954, 75 So. 2d 217, 218 wherein Florida's highest court held:

> "...It is clear that his action was barred unless his insanity tolled the statute
>
> "The general rule is that unless a statute of limitations contains a saving clause, relief from its provisions account of disability will not be granted..."

Petitioner further argues the statute of limitations actually should not have started to run until he was denied the right to vote in May of 1966. The Court below, on page 13 of its order, referred to the fact that Petitioner's amended complaint clearly stated injury by false imprisonment during the period that he was forcibly confined in the Escambia Hospital. Even if Petitioner's argument was sound and the statute did run from May, 1966, he still delayed until June 23, 1971 before filing his complaint which is more than four years.

In a third theory advanced by Petitioner, he relies on MIZELL V. NORTH BROWARD HOSPITAL DISTRICT, 427 F. 2d 468 (5th Cir. 1970) to argue that the limitation period was tolled during the pendency of the **state** proceeding to vacate the incompetency order. Even so, Petitioner would be charged with a delay of more that three years. Respondents are in agreement with the Court below that Petitioner's reliance is misplaced and that NEVELS, **supra**, and MILLS, **supra** are controlling as to the rule that the 3-year limitation under F.S. 95.11 (5) (a) is applicable to claims under 42 U.S.C. ss 1983. Petitoner's claim in State Court was to have his competency restored. The case **sub judice** was a new action originating in **federal** court, for **damages**. These arguments are but repeats of the contentions advanced below and do not confer jurisdiction on this Court under the conflict theory. The Petitioner must first gain entry to the jurisdiction of the Court before he can have an additional review on the merits of his claim.

CONCLUSION

The order of the Court of Appeals barring this claim under Florida Statutes 95.11 was correct and does not conflict with other decisions. Petitioner has failed to show conflict sufficient to invoke the jurisdiction of the Court. 28 U.S.C. ss 1343.

Respectfully submitted,

J. BEN WATKINS
Watkins & Hill
The Title Building
Tallahassee, Florida

SCOTT NABORS
Assistant Attorney General
Department of Legal Affairs
The Capitol Building
Tallahassee, Florida

BEN F. BARNES
Barnes & Grant
114 S. Jefferson Street
Marianna, Florida

THOMAS C. WILKINSON
115 N. Jefferson Street
Marianna, Florida

W.K. WHITFIELD
Exchange Building
Tallahassee, Florida

Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify two copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were furnished Ben W. Thompson, Jr., P. O. Box 1191, Tallahassee, Florida, by mail this 27th day of July, 1973.